90-1219

Supreme Court, U.S.
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CASE NO.
UNITED STATES SUPREME COURT
(1990 TERM)

FRED J. TOCCO
Petitioner

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING,

Respondent

and

TOWNSHIP OF CHERRY HILL,

Respondent.

PETITION FOR CERTIORARI
FROM A FINAL DECISION OF THE NEW JERSEY
SUPREME COURT (1990 TERM)

BRANDT, HAUGHEY, PENBERTHY,
LEWIS & HYLAND, P.A.
240 West Route 38
Moorestown, NJ 08057

On the Petition:
S. David Brandt, Esq.
Patrick F. McAndrew, Esq.

QUESTION PRESENTED FOR REVIEW

Whether a temporary taking has occurred under the Fifth Amendment of the United States Constitution, so as to require the payment of just compensation, under the following circumstances:

- The use of Petitioner Fred J. Tocco's undeveloped land was completely frozen for eighteen months by order of a state administrative agency;
- The administratively-imposed freeze was implemented through no fault of Tocco, but to help a municipality meet the municipality's obligation under New Jersey law to provide affordable housing as cheaply and economically as possible for the municipality;
- The freeze had no environmental basis. To the contrary,the freeze

was imposed because Tocco's land was free of environmental limits and prime for development;

- The freeze not only precluded any beneficial use of Tocco's land for eighteen months but also prevented Tocco from even obtaining municipal land use approvals — in direct violation of New Jersey statutes governing land use applications to municipal boards;
- The administratively-imposed freeze violated New Jersey statutes prohibiting land development moratoriums and was contrary to New Jersey Supreme Court precedent prohibiting temporary takings without compensation;
- The freeze was implemented without as much as one penny of compensation to Tocco.

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[1] The names of all parties appear in the caption so they are not listed separately. See S. Ct. R. 14.1(b).

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OPINION BELOW

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GROUNDS FOR JURISDICTION

i. Judgment to be Reviewed – Decision of the New Jersey Supreme Court, filed October 22, 1990, (Pa1) denying certification to lower State Court decisions.

ii. The case involves a "taking claim" arising under the United States Constitution, V Amendment. This provision is applicable to the states under the XIV Amendment.

iii. This Court has jurisdiction under 28 U.S.C. §1257:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may

be reviewed by the Supreme Court by writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution...."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, which provides in relevant part:

> "...[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The facts in this case are undisputed. The New Jersey Courts acted on Crossmotions for Summary Judgment; the critical facts were specifically stipulated.

This litigation has its roots in matters which have absolutely nothing to do with Petitioner Fred J. Tocco ("Tocco") – the New Jersey judiciary's quest for affordable housing in New Jersey.

The quest began with the historic decisions of the New Jersey Supreme Court which held that the State Constitution mandated that each municipality in New Jersey provide, through its local zoning code, a realistic opportunity for the construction of low and moderate income affordable housing. See Southern Burlington County N.A.A.C.P. v. Mount

Laurel Township, 67 N.J. 151, 336 A.2d 713, cert. denied 423 U.S. 808, 46 L.Ed.2d 28 (1975) and Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 456 A.2d 390 (1983) (collectively, sometimes referred to as the Mt. Laurel decisions).

Following the Mt. Laurel decisions, an exclusionary zoning law suit was filed against Cherry Hill Township ("Cherry Hill"), a New Jersey Municipality and the Third Party Defendant herein, by Fair Share Housing Center, a non-profit organization, and by other interested parties. The goal of that suit was to remedy Cherry Hill's historical failure to provide affordable housing by ending Cherry Hill's exclusionary zoning practices and formulating a "compliance plan."

Also following the Mt. Laurel decisions, the New Jersey Legislature adopted the New Jersey Fair Housing Act, N.J.S.A. 52:27D-301, in 1985. In adopting the Act, the New Jersey Legislature specifically stated it was reacting to the mandate of the Mt. Laurel decisions. See N.J.S.A. 52:27D-302. A State agency, the Council on Affordable Housing ("COAH") (the Defendant herein), was created in order to form compliance plans. COAH's mission was, acting with municipalities throughout the State, to insure that local zoning codes would provide a realistic opportunity for affordable housing and to address the historical failures of municipalities to provide this opportunity. Upon the adoption of the Fair Housing Act and the creation of COAH, the exclusionary law suit brought by Fair Share Housing Center against Cherry Hill

was transferred from the Superior Court of New Jersey to COAH.

While that law suit inched forward in COAH's administrative setting and while the parties (which did not include Tocco) attempted to resolve Cherry Hill's fair share housing obligations and how those obligations would be fulfilled, an Administrative Order (Pa54 et seq.) was entered by COAH on April 24, 1987. This Administrative Order prohibited Cherry Hill from granting any development approvals for vacant land in excess of two acres. It is this Administrative Order which effected the taking of Tocco's property. The Order issued by Defendant COAH, an executive administrative agency, says in part:

> "ORDERED that the Township of Cherry Hill, the Township of Cherry Hill Planning Board, Board of Adjustment and Zoning Board and any other person, agent or employee who has the

> authority to grant any type of development approvals are hereby restrained from granting any type of development approval for the development of any parcel of land of two acres or more in size...."

Although not a party to the ongoing litigation, Tocco was immediately affected by the Administrative Order. Tocco is a New Jersey citizen who owns a 140 acre tract of property in Cherry Hill Township, New Jersey, commonly called "Short Hills Farm." Tocco's intentions for the property were simple – to develop it in accordance with the Cherry Hill Township zoning and subdivision codes and New Jersey's Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL").

The effect of COAH's Administrative Order on Tocco was devastating. While COAH, the Township, and the other litigants in the exclusionary zoning case were attempting to devise a compliance

plan and bring the suit to a resolution,[2] Tocco was moving forward and preparing applications for the development of Short Hills Farm in accordance with the local land use codes and the MLUL. Almost simultaneously with the issuance of the COAH Administrative Order, Tocco was submitting his application for development on April 21, 1987 to the Cherry Hill Township Planning Board ("Board") for preliminary subdivision approval.

A public hearing was held by the Board on June 15, 1987. But, because of the Administrative Order issued by COAH, no action was taken by the Board. Tocco's development application was shelved. The Administrative Order issued

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[2] For the record, the parties to that litigation are still attempting to find a resolution. A compliance plan has yet to be worked out by COAH, Cherry Hill Township and the other litigants.

by COAH therefore prevented Tocco from obtaining preliminary subdivision approval for his development within the 95-day time frame mandated by the New Jersey Legislature in the MLUL; it also prevented Tocco from obtaining the vested rights which a developer automatically receives upon the granting of preliminary subdivision approval.[3] The Administrative Order kept Tocco's land in its vacant, undeveloped state, while Cherry Hill Township, COAH and the other litigants wrestled with the fate of Cherry Hill's compliance plans for affordable housing.

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[3] The MLUL requires that a municipal agency act upon an application for preliminary subdivision within 95 days. N.J.S.A. 40:55D-48(c). COAH's administrative order violated this legislative mandate and prevented Tocco from obtaining three year's of protection for the terms of approval. N.J.S.A. 40:55D-49(a). The MLUL also prohibits land development moratoriums, subject to limited health and safety exceptions not applicable here. N.J.S.A. 40:55D-90.

At the outset, the COAH Order was of unlimited duration. It was designed to preserve vacant land within Cherry Hill Township, deemed to be a "scarce resource" by COAH, so that Cherry Hill could satisfy its State constitutional affordable housing obligation as cheaply as possible. Faced with this open-ended restraint, Tocco submitted a Motion to COAH on January 29, 1988 to exempt Short Hills Farm from the Administrative Order. That request was denied on May 2, 1988 and the Order therefore continued in full force and effect, unlimited in duration.

Tocco did not file a direct appeal of the COAH denial since that appeal would have focused on whether the COAH Order was arbitrary or capricious, and not on the constitutional taking issues. The COAH Order is probably not arbitrary and capricious since it seems rather

calculated and indeed effective in achieving its purposes of preserving vacant land for Cherry Hill's benefit.

Tocco was concerned solely with the effect of the Order, so the remedy he pursued was the within claim against COAH for inverse condemnation, which can be filed under New Jersey law only in the Superior Court of New Jersey, Law Division. See Schiavone Const. Co. v. Hackensack, 98 N.J. 258, 486 A.2d 330 (1985); Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 446, 453 A.2d 200 (App. Div.) cert. denied 91 N.J. 528 (1982); N.J.S.A. 20:3-5. Defendant COAH, who imposed the freeze for Cherry Hill's benefit, joined Cherry Hill as a Third Party Defendant in this case, requesting indemnification.

The COAH Administrative Order was eventually modified[4] by the trial Court in this matter, per the Honorable L. Anthony Gibson, J.S.C.[5], after the administrative freeze had been in effect for one and one-half years. Thus, what started out as an open-ended freeze, turned out to be a one and one-half year freeze as a practical matter.

During that time, the Township negotiated, mediated, contemplated and litigated with COAH and the other participants in the affordable housing exclusionary zoning case over how the Township would meet its fair share obligation.

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[4] Even as modified, the restraints were continued and portions of Short Hills Farm remain subject to restraints as of this writing.

[5] Judge Gibson is one of three trial judges specially designated by the New Jersey Supreme Court to hear all cases in the State arising under the Mt. Laurel doctrines.

While this occurred, Tocco could not use his property or obtain any development approvals. All Tocco could do was spend significant sums of money to carry his property and wait to see the outcome of COAH and Cherry Hill's protracted dispute.

Tocco's inverse condemnation Complaint was eventually dismissed by Judge Gibson on July 7, 1989, acting on Cross-motions for Summary Judgment on stipulated facts (Pa18 et seq.). The Appellate Division of the New Jersey Superior Court affirmed in a written decision (Pa3 et seq.). In an Order (Pa1) filed October 22, 1990, the New Jersey Supreme Court declined to grant certification of the Appellate decision and let the lower Court rulings stand.

Tocco's Fifth Amendment taking claim is the principal claim in this litiga-

tion. It was raised on the face of his State Court Complaint (see Verified Complaint, ¶6 (Pa48)) and briefed throughout the proceedings below.

ARGUMENT

Special and important reasons exist for granting this Writ of Certiorari.

First, the taking issue is a significant constitutional taking issue which has long bedeviled citizens and the courts. Because of concerns about ripeness and other procedural issues, defining when regulation crosses the line and becomes a taking, permanent or otherwise, has proven elusive. See e.g., Agins v. Tiburon, 447 U.S. 255 (1980); San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981); and Williamson Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1984). Even in the case of First English Evan. Luth. Church v. Los Angeles Cty., 482 U.S. 304 (1987), where this Court decided only that compensation is available for a temporary taking, a decision was not made on when a temporary

taking occurs and the matter was remanded to the State Court for further consideration.

Tocco's plight offers this Court a great opportunity for delineating when a temporary taking occurs under Federal law. The case is simple, the facts are undisputed since they were stipulated below, and the lower Court decisions are final. State remedies were pursued to exhaustion – both literally and figuratively. Moreover, this case is not clouded by grave environmental concerns – Tocco's use of his land and his ability to seek development approvals was frozen, not because his land was environmentally limited or sensitive, but because Short Hills Farm was ideal for development. If this Court truly wishes to draw a line to illustrate where takings occur, a cleaner

canvas than this case could not be imagined.

Second, granting the Writ is also necessary in the interest of fundamental fairness and to grant Tocco meaningful judicial review. The New Jersey Courts did not fulfill the judiciary's traditional role of protecting individual rights from legislative or executive over-reaching.

In many instances, government officials such as local mayors must provide necessary municipal services and improvements within limited budgets. It is very tempting to make developers pay for those improvements and services even though the proposed development has no connection to the service or improvement. It is thus not at all unusual for a state or federal court to review the following situation: a local mayor, desiring a new traffic

light and acting with the very best of intentions, "requests" that a developer put in that new light. Even if the traffic light has been needed by the municipality for many years, the temptation is often very great for the mayor to ask the developer to pay the full bill. It is a temptation born of convenience, good intentions and sometimes local necessity. The developer in these situations often gives in simply because the developer needs its approvals and needs to move on with its financing and development; litigation is not a realistic, economic option. In cases where litigation is pursued, however, the developer looks to the court system for fundamental fairness and meaningful review.

In this particular case, the New Jersey court system in a sense became the mayor and was asked to do the impossible

– to police itself. The "war" for affordable housing in New Jersey has been started and waged in large part by the State judiciary. Had there been no Mt. Laurel decisions, there would be no COAH and none of the litigation which forms the subject matter of this case, either directly or indirectly, would have ever taken place.

Having defined the ends, i.e., affordable housing, it is difficult for New Jersey Courts to objectively and fairly assess the means to accomplish those ends. It is akin to asking the mayor of a small town whether it is fair to extract a long-needed traffic light from a large developer. We do not quarrel with the worthiness of the end – affordable housing is a legitimate public goal and it is a worthy objective. The issue here is whether the means of freezing the use

and development of Tocco's property for the benefit of Cherry Hill Township is a fair burden to place solely on the shoulders of Tocco.

New Jersey Courts are peculiarly unsuited to address this issue since, having set the agenda and goals, they have a real stake and interest in seeing that the goals are accomplished. These inherent limitations are reflected in the decisions below and in related cases.

The paradox of New Jersey Courts reviewing the means used to achieve affordable housing was reflected in Judge Gibson's trial decision herein. The restraint imposed by COAH had been renewed by the trial Court, albeit in modified form, in its own injunction. Thus, if Judge Gibson found COAH's Order effected a taking, the same might be true of the trial Court's own subsequent in-

junction – a fact alluded to by the trial Court. See Trial Court Transcript, (Pa28-Pa29).

The intermediate New Jersey Appellate Court upheld the trial Court's ruling and illogically condoned the one and one-half year deprivation of use and development inflicted on Tocco because Tocco did not stand alone. Several other developers were similarly situated and affected. The Appellate Division of the Superior Court of New Jersey ruled, in effect, that a taking might have occurred had Tocco been singled out. But since several people may have had their constitutional rights curtailed, a taking did not result. The apparent lesson to be learned is that constitutional misery likes company and if government is to engage in constitutional violations it should do it on a whole-scale basis.

In addition to the Appellate Division's bizarre ruling, the New Jersey Supreme Court declined Tocco's petition for certification even though the eighteen month deprivation of use was squarely prohibited by a decision of the New Jersey Supreme Court issued in 1968, entitled Lomarch v. Englewood, 51 N.J. 108 (1968). In Lomarch, the New Jersey Supreme Court held that a municipality could not freeze the use of a developer's land for even one year in order to determine if it would be utilized for a street or other public purposes, unless compensation was paid. In declining to review the Appellate Division's decision in this case, the New Jersey Supreme Court elected to ignore its own precedent in Lomarch and elected to ignore the doctrine of stare decisis.

Just how far New Jersey Courts will go in their efforts to achieve the judicially imposed goal of affordable housing was recently revealed in Holmdel Builders Association v. Township of Holmdel, et al, ___ N.J. ___ (1990). That case was concerned with impact fees which were being imposed by municipalities across New Jersey in an effort to collect money from developers so that the municipalities could build affordable housing and cure the municipality's historical fair share housing deficiencies. Since developers were being singled out to pay for public programs in the form of affordable housing, which were no different in theory than the public's need for new schools or new roads, it was believed that the impact fees would be subject to a traditional rational nexus requirement between the proposed development and the exac-

tion. This Court, of course, most recently reviewed and applied the traditional rational nexus requirement between development and exactions in Nollan v. California Coastal Com'n., 483 U.S. 825 (1987).

In the Holmdel Builders Association case, however, the New Jersey Supreme Court specifically held "that the rational-nexus test is not apposite in determining the validity of inclusionary zoning devices generally or of affordable housing development fees in particular." __ N.J. at __ (Slip Opinion, p.27). Rather than ask whether the exaction of an impact fee was fair, the Court asked whether it was efficient. See id. By refusing to apply the traditional rational nexus test in Mt. Laurel litigation, the New Jersey Supreme Court is essentially saying it is all right to single

out certain people to pay for affordable housing, in one form or another, so long as the goal for affordable housing is achieved. Any meaningful inquiry into fairness was avoided. The ends will, according to the New Jersey judiciary, justify the means.

CONCLUSION

In sum, granting the Writ of Certiorari in this case is appropriate because the Court is presented with a unique chance. It is a chance to delineate when temporary takings occur and to provide guidance to courts, regulators and citizens on these significant public issues. It is important that public goals be achieved; it is just as important that they be fairly achieved.

The New Jersey Courts are unusually ill-equipped in this particular instance to assess fairness of the means. Usual-

ly, the Legislature or the Executive Branch selects the goals and the judiciary reviews the means for fairness and appropriateness. In this instance, the New Jersey Courts, much like the mayor in a small town seeking to obtain public services and improvements within a limited budget, is blinded by its own agenda and by goals fashioned by its own hand.

It is certainly important that the goal of affordable housing be achieved. But why Fred Tocco should be forced to bear a unique exaction – the dedication of his land as essentially open space for a year and a half and a prohibition on him even obtaining any local development or approvals for a year and a half – remains a mystery.

We therefore respectfully request that this Court grant the within Petition, reverse the State Courts below, and

afford Tocco just compensation for the temporary taking which clearly took place in this case.

BRANDT, HAUGHEY, PENBERTHY,
LEWIS & HYLAND, P.A.

By S. David Brandt
S. DAVID BRANDT

Dated: 1/28/91

On the Petition:
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